

**CALIFORNIA REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL VALLEY REGION**

**ADMINISTRATIVE CIVIL LIABILITY COMPLAINT NO.
R5-2014-0576**

**COLLINS PINE COMPANY
CHESTER SAWMILL
PLUMAS COUNTY**

PROSECUTION TEAM'S LEGAL AND TECHNICAL ANALYSIS

I. Introduction

On November 7, 2014, the Central Valley Regional Water Quality Control Board (Central Valley Water Board or Board) issued Collins Pine Company (Collins Pine or Discharger) Administrative Civil Liability Complaint R5-2014-0576 (Complaint) assessing mandatory minimum penalties (MMPs) in the amount of two hundred thirteen thousand dollars (\$213,000) for violating effluent limitations in Waste Discharge Requirements Order No. R5-2009-0015 (Permit). The Permit establishes effluent limitations for several pollutant parameters – most relevant to this matter are Chemical Oxygen Demand, pH, Copper (Total Recoverable), and Lead (Total Recoverable). Pursuant to the Permit's Monitoring and Reporting Program, the Discharger is required to conduct effluent monitoring to assess compliance with its effluent limitations and submit self-monitoring reports (SMRs) to the Board on a monthly, quarterly, semi-annual, or annual basis. The Discharger self-reported a total of eighty (80) effluent limit violations in its SMRs as summarized in Attachment A to the Complaint. Pursuant to California Water Code section 13385 subdivisions (h) and (i), the Central Valley Water Board must assess MMPs when certain effluent limit violations occur. Out of the eighty (80) effluent limit violations self-reported by the Discharger, seventy one (71) are subject to a MMP as described in further detail below.

II. The Mandatory Minimum Penalty Statute – Legal Framework

Water Code section 13385 subdivision (h)(1) states, "Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each serious violation. The Water Code defines a "serious violation" as "any waste discharge that violates the effluent limitations contained in the applicable waste discharge requirements for a Group II pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal Regulations, by 20 percent or more or for a Group I pollutant, as specified in Appendix A to section 123.45 of Title 40 of the Code of Federal Regulations, by 40 percent or more."

The Water Code also provides that a MMP shall be assessed for certain "non-serious or chronic" effluent limit violations occur. Specifically, Water Code section 13385 subdivision (i)(1) states, "Notwithstanding any other provision of this division, and except as provided in subdivisions (j), (k), and (l), a mandatory minimum penalty of three thousand dollars (\$3,000) shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months, except that the requirement to assess the mandatory minimum penalty shall not be applicable to the first three violations: (A) Violates a waste discharge requirement effluent limitation."

Chemical Oxygen Demand (COD) is considered a Group I pollutant or a "conventional pollutant" and Copper (Total Recoverable) and Lead (Total Recoverable) are considered Group II pollutants or "priority pollutants" pursuant to the Code of Federal Regulations and Appendix C of the State Water Resources Control Board's (State Water Board) Water Quality Enforcement Policy. If a waste discharge of COD exceeds the COD effluent limit in the permit by 40 percent or more or if a waste discharge of copper or lead exceed the copper and lead effluent limits by 20 percent or more, those effluent limit violations are considered "serious violations" and the Central Valley Water Board must assess a MMP in the amount of \$3,000 for each serious

violation. pH is neither a Group I nor a Group II pollutant, however, exceedances of the effluent limit for pH will still subject a discharger to MMPs pursuant to Water Code section 13385 subdivision (i). Furthermore, if a discharger violates its effluent limitation for a Group I or II pollutant but that violation is not considered a "serious violation" because it doesn't exceed the limit by 40% or more or 20% or more, respectively, non-serious violations of Group I or Group II effluent limits will also be subject to a MMP under Water Code section 13385 subdivision (i). A MMP pursuant to this subdivision shall be assessed by the Central Valley Water Board if a discharger chronically violates any of the effluent limits in the Permit. Should a discharger violate any of its effluent limits four or more times in any period of six consecutive months, a MMP of \$3,000 shall be assessed beginning with the fourth violation.

III. Because Specific Effluent Limit Violations Occurred, the Central Valley Water Board Must Assess a Mandatory Minimum Penalty in the Amount of Two Hundred Thirteen Thousand Dollars (\$213,000).

As noted in the Discharger's SMRs and summarized in Attachment A to the Complaint, analytical results reported by the Discharger exceed the corresponding effluent limitation established in the Permit. Attachment A summarizes the eighty (80) effluent limit violations self-reported by the Discharger and the corresponding MMP that applies to each of the violations. According to the Discharger's SMRs, Paragraphs 11 through 15 of the Complaint, the tabular summary in Attachment A, and applying the legal principles pertaining to the MMP statute outlined above, seventy-one (71) out of the eighty (80) effluent limit violations are subject to MMPs for a total of two hundred thirteen thousand dollars (\$213,000) that must be imposed by the Central Valley Water Board.

IV. An Application of the Plain Meaning Rule and an Inquiry into the Statute's Legislative Purpose Indicate the Legislature Intended these Provisions to be Mandatory Leaving the State and Regional Water Boards Without Any Discretion.

The cardinal rule of statutory construction is to pursue the intention of the Legislature and effectuate the purpose of the law. (*S.D. Myers, Inc. v. City and County of San Francisco* (2003) 336 F.3d 1174, 1179.) The California Supreme Court has held that when the court interprets any statute, it is well settled that it begins with the statute's words "because they generally provide the most reliable indicator of legislative intent." (*Hsu v. Abbata* (1995) 9 Cal.4th 863, 871.) If the language is clear and unambiguous, there is ordinarily no need for judicial construction. (See *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103.) In construing a provision, "we presume the Legislature meant what it said" and the plain meaning governs. (*People v. Snook* (1997) 16 Cal.4th 1210, 1215.)

The language of Water Code section 13385 subdivision (h) is clear. A MMP of three-thousand dollars "shall be assessed for each serious violation." (emphasis added.) Additionally, the language of section 13385 subdivision (i) is similarly clear stating that a MMP of three-thousand dollars "shall be assessed for each violation whenever the person does any of the following four or more times in any period of six consecutive months..." (emphasis added.) The use of the

mandatory language "shall" indicates a legislative intent to impose a mandatory duty; no discretion is granted. (*In re Luis B.* (2006) 142 Cal.App.4th 1117, 1123.)

Furthermore, the State Water Board previously considered a Regional Water Board's ability to settle an administrative action for MMPs for less than the mandated minimum. (In the Matter of the Petition of Escondido Creek Conservancy and San Diego Coast Keeper, Order WQ 2007-0010, 3.) The State Water Board determined that the San Diego Regional Water Board could not adopt an order approving a settlement agreement for less than the MMP unless the MMP was improperly assessed or an affirmative defense applied.

In its decision, the State Water Board stated, "The Legislature removed discretion from the water boards when it enacted MMPs in 1999." (*Id.* at 6.) The State Water Board further explained, "If violations occur that are subject to MMPs and an administrative civil liability complaint is issued, any administrative action that results in a fine lower than the minimum statutory requirement must be accompanied by a determination either that the MMP was not correctly assessed or that the discharger proved an appropriate affirmative defense." (*Id.* at 5-6.) This means that MMPs will apply unless there was an error in assessing the violation as one that is subject to a MMP or a discharger has met its burden of proof demonstrating an affirmative defense. The State Water Board vacated the San Diego Water Board's order and remanded the matter back to the Board ordering that "[t]he amount of liability to be assessed must be no less than the minimum liability required by Water Code section 13385, based on factual determinations of the San Diego Water Board." (*Id.* at 7.)

V. The Central Valley Water Board Prosecution Team Validated the Alleged Violations, Determined the Violations are Correctly Assessed, and Preliminarily Determined that an Affirmative Defense Does Not Apply to this Matter. Therefore, MMPs Must be Assessed in the Amount of \$213,000.

In the current matter, the Central Valley Water Board Prosecution Team have validated the alleged violations and determined that the violations at issue in the Complaint have been correctly assessed. Furthermore, the Discharger has the burden of proving that a statutorily recognized affirmative defense to MMPs applies in this matter. Preliminarily, the Prosecution Team does not believe a valid affirmative defense can be raised nor proven in this instance; however, it is the Discharger's duty to raise such a defense or other legal or technical arguments in its forthcoming submission. Therefore, based on the foregoing, the Prosecution Team asserts that the Central Valley Water Board must assess administrative civil liability in the amount of two hundred thirteen thousand dollars (\$213,000) in mandatory minimum penalties.

For the Prosecution Team



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